BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BARBARA A. MORRIS Claimant	)	
VS.	)	
WAL-MART Respondent	)	Docket No. **1,039,233**
AND	)	
AMERICAN HOME ASSURANCE CO. Insurance Carrier	)	

ORDER

Claimant requests review of the February 23, 2011 Award by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on June 22, 2011.

APPEARANCES

James E. Martin of Overland Park, Kansas, appeared for the claimant. Ryan D. Weltz of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The claimant alleged an injury to her back while lifting at work. She had suffered a similar injury before and respondent alleged her current problems were due to the natural progression of her preexisting degenerative back condition. The Administrative Law Judge (ALJ) determined claimant had suffered a compensable work-related injury and awarded her compensation for a 71.75 percent work disability based upon a 43.5 percent task loss and a 100 percent wage loss.

Claimant requests review of the nature and extent of her disability. She argues that her physical condition in conjunction with her age, education, work experience, location where she lives and the poor job market combine to establish that she is permanently, totally disabled from performing substantial gainful employment in the open labor market.

Conversely, respondent argues that claimant's degenerative condition has worsened without any relationship to her work activities. Consequently, respondent further argues claimant did not meet her burden of proof to establish that she suffered accidental injury arising out of and in the course of her employment. Respondent also argues that claimant did not meet her burden of proof to establish that she suffered any permanent impairment.

The issues raised on review for Board determination are whether claimant suffered a work-related injury arising out of and in the course of her employment and, if so, the nature and extent of her disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was hired as a night stocker for Wal-Mart in Paola, Kansas, in March 2004. Her job duties required her to sort already loaded pallets and then use a pallet jack to move them from the back room to the floor aisles. The products that she restocked were kitchenware, totes and appliances. These items weighed anywhere from 30-50 pounds. The physical requirements for stocking the shelves included lifting, reaching, bending, twisting, turning and climbing ladders. As a full-time employee, claimant worked the night shift from 10 p.m. to 6 a.m.

On September 21, 2007, claimant was unloading a pallet onto an "L" cart which carries the freight from the pallets to the aisles. She was lifting totes out of a box and when she turned to place them on the shelf her back popped. Claimant had immediate pain in her back and down her right leg. She continued working in order to finish the job and then she advised her supervisor, Karen Garrison, that she had hurt her back. Respondent referred claimant to Dr. Joseph Galate for medical treatment. Claimant received an injection, medication and was taken off work by Dr. Galate for three days. Light-duty work was provided by respondent. Claimant continued to receive treatment but she was terminated from respondent's employ due to absenteeism.

Dr. Joseph Galate, board certified in physical medicine and rehabilitation, examined claimant on October 19, 2007, at respondent's request. The doctor had previously evaluated claimant on August 25, 2006, for an injury to her lower back with pain going into her right gluteal region. The 2006 MRI revealed a bulging disc at L4-5, central and off the left-hand side, as well as a small bulging disc at L5-S1. Claimant underwent physical

therapy, two right SI joint injections and medications for treatment and then was released in December 2006 without restrictions. Claimant testified that after the medical treatment for the back injury in 2006 she recovered completely and returned to work.

For the September 2007 injury, claimant had been treated by an occupational medicine physician who provided medications and physical therapy. Upon physical examination, Dr. Galate opined claimant had re-aggravated the pain in her right gluteal region but the pain was going down further in her right leg. The doctor reviewed the October 11, 2007 MRI which revealed mild degenerative changes at L3-4, L4-5 and L5-S1, bulging discs with degenerative changes in the facets at those levels but there was no evidence of central stenosis, foraminal narrowing or thecal sac attenuation at any level. Dr. Galate recommended additional SI joint injections, anti-inflammatory medication and muscle relaxers. Claimant was released to light-duty work. Claimant also received narcotic pain medication and physical therapy. On January 17, 2008, Dr. Galate released claimant to return to work without restrictions. Respondent terminated claimant on January 24, 2008. Then on February 26, 2008, claimant returned for a follow-up visit with Dr. Galate. Claimant was feeling better, had been weaned off all medications and the pain was intermittent so Dr. Galate released her from his care. The doctor opined claimant had reached maximum medical improvement.

Based on the AMA *Guides*[1], Dr. Galate provided a rating for claimant's back. For her preexisting arthritic conditions in her lumbar spine, the doctor placed her in the DRE Category II Minor Impairment which was a 4 percent whole person impairment. On December 2, 2010, Dr. Galate reviewed some additional medical records with regard to future medical treatment needs. The doctor opined claimant may require narcotic or pain medication for longer periods of time. Dr. Galate's 4 percent rating did not change and claimant did not need any restrictions due to her September 2007 accident. Dr. Galate reviewed the list of claimant's former work tasks prepared by Ms. Sprecker and concluded claimant could perform all of the 34 tasks for a 0 percent task loss.

Dr. Galate testified:

> Q. Did you have an impression as to what type of work she could do or shouldn't do?
>
> A. I think most people would, within reasonable amount of medical certainty, not do a job that would place them -- increase their pain and do more harm than good.
>
> Q. Would jobs that require she do repetitive bending, lifting, stooping, carrying, that type of thing, aggravate the type of symptoms that she had?

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[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

A. That's the job that she had previously. Her Wal-Mart job went up to a 50 pound lift with occasional bending and lifting.

Q. Would that type of thing aggravate her pain?

A. Possible.

Q. Would you say she probably shouldn't do that?

A. It probably wouldn't be in her best interest lifting 50 pound bags all day, no, I probably wouldn't recommend that, but people got to eat also.

Q. Okay. Again, if she had to stand all day in one place and bend over repeatedly, would that be in her best interest to do that type of work? Let me rephrase that because that's -- we could debate that forever. Is that likely to increase her --

A. It could.

Q. -- back pain?

A. Could.[2]

Dr. Galate opined that there was not any significant change between claimant's two MRIs. But he further opined that claimant's underlying degenerative disc disease was aggravated by her accidental injury in September 2007.

Dr. Jeffrey MacMillan, board certified orthopedic surgeon, examined and evaluated claimant on September 3, 2009, at respondent's attorney's request. The doctor reviewed claimant's diagnostic studies including x-rays, October 11, 2011 MRI and a lumbar myelogram/CT scan. He also gathered a history of claimant's work injuries and medical records. Upon physical examination, Dr. MacMillan found claimant had tenderness over the right greater trochanter and over the right hip short external rotators, severe pain in her right buttock extending into her low back with right hip internal rotation, straight leg raising and Laségue's signs provoked low back pain on the right side but no radiculopathy and a mild antalgic gait due to favoring the right lower extremity. The doctor diagnosed claimant with facet syndrome, right L-5 radiculopathy from synovial cyst, right trochanteric bursitis and right piriformis syndrome. Dr. MacMillan recommended an EMG/NCS right lower extremity, trial facet blocks and a possible excision right L5-S1 synovial cyst. Light physical demand restrictions were placed on claimant which were not related to claimant's work injury. The doctor opined that claimant demonstrated significant signs of symptom magnification including non-physiologic complaints, exaggerated sensitivity to light touch and inappropriate or inconsistent responses to distraction.

[2] Galate Depo. at 29-30.

In a letter dated October 22, 2009, to respondent's attorney, Dr. MacMillan had reviewed claimant's EMG/NCS study performed on September 24, 2009, by Dr. Michael Ryan, a neurologist. The EMG/NCS study revealed mild neuropathy but did not show any objective evidence of radiculopathy. Dr. MacMillan opined that claimant's neuropathy was not the result of her work-related injury.

On March 5, 2010, Dr. MacMillan sent a letter to respondent's counsel indicating that claimant sustained a 5 percent permanent impairment to her low back and a 5 percent impairment due to her peripheral neuropathy which were based on the AMA *Guides*. These combine for a total 10 percent whole person impairment all of which Dr. MacMillan apportioned to claimant's age-related degenerative conditions and not the alleged injury of September 2007. Dr. MacMillan also recommended restrictions within the light physical demand category but again noted such restrictions were not due to any work-related condition.

Dr. Edward Prostic, board certified certified orthopedic surgeon, examined and evaluated claimant on April 28, 2008, at claimant's attorney's request. The doctor reviewed claimant's medical history and also obtained a history of the accident. At the time of the examination, claimant was complaining of pain in her lower back with radiation down the right leg as well as numbness and tingling. Dr. Prostic's physical examination of claimant revealed severe tenderness at L5 and limited range of motion. An MRI revealed significant degenerative changes of the posterior facets of the lower lumber levels. The doctor opined that claimant's work-related accident aggravated her disease rather than caused it. X-rays of the lumbar spine showed disc space narrowing at L5-S1 with slight pseudo spondylolisthesis at that level. Also, degenerative changes were noted diffusely at the posterior facets. Pseudo spondylolisthesis is an abnormal forward slippage of one vertebrae or another. The previous MRI was normal and claimant fully recovered from the 2006 accident.

Dr. Prostic diagnosed claimant with a right S1 radiculopathy from lateral recess stenosis at L5-S1. The doctor opined that claimant's September 2007 accidental injury superimposed upon her preexisting disease. A CT myelogram was recommended and possible surgery if the nerve was determined to be compressed. Otherwise, injections of cortisone to the right trochanteric bursa.

On June 1, 2010, claimant was again seen by Dr. Prostic due to complaints of pain in her right lower back down to her right foot with numbness intermittently to toes and the bottom of her foot. Upon physical examination, Dr. Prostic noted claimant walked with a mild antalgic gait while favoring her right leg. Claimant also had diffuse tenderness about the right buttock and poor range of motion.

> Q. You note that sensation is decreased throughout the right lower extremity. What's the significance of that?

A. This is a sign of symptom magnification.

Q. What does that mean?

A. That she was elaborating upon what was actual and physical.[3]

Dr. Prostic opined that new x-rays were taken of claimant's low back which did not show any change from the previous study. The doctor diagnosed claimant with an S1 radiculopathy from aggravation of degenerative disc disease at L5-S1. Claimant's significant objective findings of degenerative disc disease and lateral recess stenosis with an irritated nerve. Dr. Prostic opined that claimant's work-related injury at Wal-Mart on September 21, 2007, was the cause of her problems. Based on the AMA *Guides*, Dr. Prostic gave claimant a 20 percent functional impairment to the body as a whole.

Dr. Prostic reviewed the list of claimant's former work tasks prepared by Mr. Michael Dreiling and concluded claimant could no longer perform 13 of the 15 tasks for an 87 percent task loss. The nature of restrictions that Dr. Prostic imposed on claimant are unknown as he never identified them during his deposition testimony and his report of examination was not offered as an exhibit. The doctor opined claimant was not capable of working in the open labor market. But on cross-examination Dr. Prostic opined that claimant was employable at her examination on April 28, 2008. Dr. Prostic explained his later determination why claimant was unemployable:

> Q. What would be the reason then that your opinion changed from when you first saw her in 2008, to when you most recently examined her and felt that she was no longer able to work?
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> A. I think there is a second problem going on with this lady, which is an emotional one, and I think that her emotional state worsened during that period of time, and it led to the physical examination worsening. She had less good range of motion the second time and worsening of sensory findings, some of which I think were real, and some of which were probably not real.
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> Q. So, do I take it correctly that the reason that she would be unemployable is at least in part due to her psychological response to her physical condition?
>
> A. Yes.
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> Q. Did you identify any particular emotional state or attempt to formulate any psychological diagnosis with respect to her?
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> A. I did not.

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[3] Prostic Depo. at 13.

Q. Would you be qualified to do that?

A. I think so, but the Court doesn't. [4]

Michael Dreiling, a vocational consultant, conducted a personal interview with claimant on July 13, 2010, at the request of claimant's attorney. He prepared a task list of 15 nonduplicative tasks claimant performed in the 15-year period before her injury. Mr. Dreiling opined that claimant was essentially and realistically unemployable when you take into consideration her age, education, vocational training and no clerical skills as well as restrictions, current labor market and geographic location.

Michelle Sprecker, a vocational rehabilitation counselor, conducted a telephonic interview with claimant on January 18, 2011, at the request of respondent's attorney. She prepared a task list of 34 nonduplicative tasks claimant performed in the 15-year period before her injury. At the time of the interview, claimant was not working. Ms. Sprecker thought claimant was capable of returning to her pre-accident job based on no restrictions from Dr. Galate. Ms. Sprecker further noted that she was unable to determine whether claimant had a task loss based on Dr. Prostic's report as he did not identify any restrictions. Ms. Sprecker testified:

> Q. And what, if any restrictions did you identify from Dr. Prostic's June 1st, 2010 report?
> A. Based on Dr. Prostic's report, he indicates that Ms. Morris is unable to return to gainful employment.
> Q. Okay. Did you attempt to discern any task loss associated with that opinion then?
> A. I was not able to as Dr. Prostic did not provide specific information pertaining to permanent physical restrictions.[5]

Respondent argues that claimant failed to meet her burden of proof that she suffered accidental injury arising out of and in the course of employment. It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[6] The test is not whether the job-related activity or injury caused the condition but whether the job-related

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[4] Prostic Depo. at 19.

[5] Sprecker Depo. at 9.

[6] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984)*; Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

activity or injury aggravated or accelerated the condition.[7] Both Drs. Galate and Prostic concluded that claimant's work incident aggravated her preexisting degenerative lumbar spine condition. The ALJ analyzed the evidence in the following fashion:

> The claimant sought an opinion from Dr. Prostic, who felt the claimant's work incident aggravated degenerative changes in the lumbar spine. Of the three physicians, two felt there was a distinct injury or aggravation from the September 28, 2007 event. The one dissenter, Dr. MacMillan, based his opinion on the claimant having a repetitive use injury, which did not appear to be the case. Dr. Galate, who saw the claimant for both the present injury and her prior injury, was probably in the best position to assess whether the claimant had a material change in her physical condition.
>
> A preponderance of the evidence showed the claimant injured her low back in the course and scope of employment on or about September 28, 2007.[8]

The Board agrees and affirms.

The next issue raised on review is the nature and extent of disability, if any, claimant suffered as a result of the accidental injury. Claimant argues that she is entitled to an award for a permanent total disability. K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2) , the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[9]

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[7] *Hanson v. Logan U.S.D. 326*, 28 Kan. App.2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

[8] ALJ Award at 3.

[9] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

In *Wardlow*[10], the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work. The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

In this case Dr. Prostic and Mr. Dreiling both concluded that claimant was unable to engage in substantial gainful employment. Conversely, Dr. Galate released claimant to work without restrictions and Ms. Sprecker opined claimant could return to gainful employment based on the fact that Dr. Galate released claimant without restrictions. Dr. MacMillan felt claimant was capable of performing work in the light physical demand category as defined by the U.S. Department of Labor, *Dictionary of Occupational Titles*.

Dr. Prostic simply provided a conclusory opinion that claimant was unable to return to work. But when he initially examined claimant in 2008 he felt she was capable of working. And his explanation for his changed opinion was claimant's changed emotional condition which the doctor seemed to attribute to her symptom magnification. And there is neither a contention nor medical evidence to support a claim for a psychological impairment. But even more troubling is the absence of detailed physical restrictions from Dr. Prostic. From this evidentiary record it cannot be ascertained what physical activities of claimant were restricted by Dr. Prostic. Consequently, Mr. Dreiling's reliance upon Dr. Prostic is equally troubling. Mr. Dreiling did not identify any restrictions imposed by Dr. Prostic. Mr. Dreiling testified:

> Q. What were the restrictions that were provided by Dr. Prostic?
>
> MR. KAUPHUSMAN: Object, medical hearsay.
>
> A. His report of June 1st, 2010 indicated that presently the patient was unable to return to gainful employment.[11]

Mr. Dreiling then relied upon Dr. Prostic's conclusion that claimant could not work and added claimant's subjective complaints regarding what she could no longer do to arrive at his opinion that claimant could not work. For example, claimant stated she could not stand for more than 30 minutes but the evidentiary record does not contain such a restriction from a physician.

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[10] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

[11] Dreiling Depo. at 8-9.

Conversely, both Drs. Galate and MacMillan opined claimant could engage in substantial gainful employment as did vocational expert, Ms. Sprecker. The ALJ analyzed the evidentiary record and concluded claimant failed to meet her burden of proof that she was unable to engage in substantial gainful employment. The Board agrees and affirms.

Because claimant's back injury is not compensated under the schedule in K.S.A. 44-510d, claimant's permanent disability benefits are governed by K.S.A. 44-510e, which provides in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.

In *Bergstrom,*[12] the Kansas Supreme Court interpreted K.S.A. 44-510e and ruled that actual post-injury earnings must be used in computing the wage loss component of the permanent partial general work disability formula. Because claimant has not found other employment, the Board finds claimant has a 100 percent wage loss.

Turning to the task loss and claimant's functional impairment, the ALJ detailed the evidence in the following manner:

> K.S.A. 44-510e defines work disability as the average of the employee's percentage wage loss and the employee's percentage loss of ability to perform work tasks used in the employee's 15 year work history. The percentage task loss must be in the opinion of the physician. Dr. Galate reviewed a 15 year work task history for the claimant as compiled by vocational expert, Michelle Sprecker. Based on his release to return to work without restrictions, Galate said the claimant had the ability to perform all of the listed tasks. As previously mentioned, however, there were suggestions in Galate's testimony that he was not comfortable with the claimant performing work in a wholly unrestricted fashion. Dr. Prostic testified to an 87% task loss, but, as previously mentioned, he considered a physical presentation that he admitted was not accurate. Both of the task loss opinions were somewhat flawed, but in that sense they were equally credible. The claimant's task loss is held to be the mean of the two opinions, or 43.5%. This, averaged with the claimant's 100% wage loss produces a general "work" disability of 71.75%.[13]

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[12] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

[13] ALJ Award at 5.

> Regarding functional impairment, and on the same principles applied to task loss, the court averages Dr. Prostic's 20% rating and Dr. Galate's 0% rating and finds 10% permanent impairment to the whole person.

The Board agrees and affirms.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[14] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated February 23, 2011, is affirmed.

IT IS SO ORDERED.

Dated this 22nd day of July, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James E. Martin, Attorney for Claimant
Ryan D. Weltz, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge

[14] K.S.A. 2010 Supp. 44-555c(k).